Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

July 1 to September 30, 2007

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Production Summary

- The active inventory totalled 4,966 (24% over the target of 4,000 cases). This is an encouraging reduction from the previous quarter result of 5,051.

- Incoming appeals numbered 943 and of these, 800 were appeals from WSIB decisions and 143 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 812 new appeals and 136 reactivated appeals recorded in the second quarter of 2007.
  - In the 3rd quarter of 2006 the Tribunal recorded 904 new appeals and 183 re-activations.
  - In 2006, the weekly average of hearing ready appellants was 64. For Q3 2007, the weekly average of hearing ready appellants is 54. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,031; this includes 370 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 661 after hearing dispositions; of the after hearing dispositions, 640 followed from Tribunal decisions.

- The inactive inventory decreased by 36 cases to 4,072 (at the end of Q2-07, the inactive inventory was 4108 cases).

- In Q3 2007, 88% of final decisions were released within 120 days. In 2006, 81% of final decisions were released within 120 days.

- The Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. Recent appointments and re-appointments have enabled an increase in the hearing schedule to address the volume of cases.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2007, the notice inventory included 1,294 dormant cases, the active inventory totaled 4,966 cases, and the inactive inventory totaled 4,072 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q2-2005	5352
Q3-2005	5379
Q4-2005	5290
Q1-2006	5321
Q2-2006	5419
Q3-2006	5496
Q4-2006	5231
Q1-2007	5176
Q2-2007	5051
Q3-2007	4966

B. Incoming Appeals

Period	Incoming Appeals
Q2-2005	1198
Q3-2005	1056
Q4-2005	1100
Q1-2006	1144
Q2-2006	1124
Q3-2006	1087
Q4-2006	1008
Q1-2007	1026
Q2-2007	950
Q3-2007	943

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q2-2005	1048	416	632
Q3-2005	1016	479	537
Q4-2005	1189	465	724
Q1-2006	1146	435	711
Q2-2006	1131	477	654
Q3-2006	1083	426	657
Q4-2006	1161	362	799
Q1-2007	1148	382	766
Q2-2007	1131	366	765
Q3-2007	1031	370	661

D. Inactive Inventory

Period	Inactive Inventory
Q2-2005	4243
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4349
Q3-2006	4302
Q4-2006	4234
Q1-2007	4118
Q2-2007	4108
Q3-2007	4072

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73
Q4-2006	1420	112
Q1-2007	1353	-67
Q2-2007	1297	-56
Q3-2007	1294	-3

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Community Activities

The Tribunal staff supported the Ontario Bar Association's Workers' Compensation Section meeting in September at the Ron Ellis Award dinner. This year's recipient was Professor Paul Weiler. In the 1980's, Professor Weiler conducted a comprehensive review of workers' compensation in Ontario. His three reports to the Ontario Government concerning the restructuring of workers' compensation led to significant policy and administrative changes, including the creation of the Appeals Tribunal. The evening was a great success.

Volume 80 of the WSIAT Reporter was posted on the website during this period.

Keep up to date with Tribunal news using an RSS feed! The Tribunal's web site is www.wsiat.on.ca; instructions are located at the bottom of the home page.

Judicial Review Activity

Set out below is the status of applications for judicial review involving the Tribunal for the third quarter of 2007; also included is the status of other proceedings.

Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

Judicial Reviews

1. Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the Applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems. The issue for the Vice-Chair was one of medical continuity, compatibility and causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

The judicial review was heard in Sudbury on October 5 2006. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing *Decisions Nos. 433/99* and *433/99R*.

The Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

This is the first time a decision of the Tribunal has been quashed on judicial review in twenty-one years. The Tribunal filed a Notice of Motion for Leave to Appeal. The Court of Appeal granted Leave to Appeal on May 31, 2007 (Rosenberg, Rouleau and Killeen). This case will be heard by the Court of Appeal in February 2008.

2. Decisions Nos. 1402/03 (January 19, 2004) and 1402/03R (August 19, 2005)

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labour Relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. The judicial review was heard by a Divisional Court panel of Carnwath, Matlow, and Jennings on March 9. The Court released its decision on April 2, unanimously dismissing the application for judicial review.

Following a helpful summary of the application of the standard of review of patent unreasonableness as it applied to the Tribunal, the Divisional Court found the Tribunal acted within its area of expertise in refusing to consider the wage rate in the collective agreement. The Court also found the Tribunal had applied the correct provisions of the *WSIA*, and the Tribunal's conclusions were based on the evidence and not patently unreasonable. The Court rejected the argument that the Tribunal was required to consider the effect of the collective agreement by virtue of the Supreme Court of Canada's decision in *Tranchemontagne v Ontario (Director, Disability Support Program)*, since the collective agreement was not "law".

Counsel for the worker filed a notice of motion for leave to appeal to the Court of Appeal. On October 2, a Panel comprised of Justices Doherty, Armstrong and Lang refused to grant leave to appeal, and awarded costs against the worker.

3. **Decision No. 855/03 (November 15, 2005)**

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review.

The judicial review was heard on June 27. The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider evidence of legislative history which were contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, and was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

At the end of the quarter the Tribunal had filed a notice of motion for leave to appeal to the Court of Appeal.

4. **Decisions Nos. 172/02I (February 28, 2002), 172/02 (September 22, 2003) and 172/02R (June 30, 2004)**

In January 1995 a worker injured his elbow and back. He received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In *Decision 172/02* the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in *Decision 172/02R*, allowing the temporary total disability benefits to be further backdated to September 9th, 1998. A further request to reconsider for the period benefits was dismissed.

The worker commenced an application for judicial review. After taking no action on the application for a considerable period, the Divisional Court Registrar advised counsel for the worker that if the judicial review was not perfected by May 10th it would be dismissed. Counsel for the worker perfected the judicial review just prior to the deadline.

The Tribunal filed its factum. The judicial review is scheduled to be heard on October 25th.

5. **Decisions Nos. 167/06 (March 9, 2006) and 167/06R (December 14, 2006)**

The worker injured his back in May 1990. He received benefits until November 1992. The worker continued to complain of pain in his back, but medical investigation was unable to determine an organic cause for the reported pain. The worker appealed to the Tribunal for entitlement for benefits on the basis of chronic pain disability, or in the alternative on the basis of organic entitlement. The worker claimed that his family doctor had provided an inaccurate, intemperate and unprofessional medical opinion that should not be relied upon.

The Vice-Chair refused to discount the opinion of the family doctor. He also relied upon the opinions of other doctors, and evidence relating to a subsequent accident which called into question the genuineness of the worker's complaints.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings with the Court. At the end of the quarter the Tribunal was waiting to receive the worker's factum.

6. ***Decision Nos. 1971/00* (January 24, 2001), *1971/00R* (December 11, 2001), *and 1971/00R2* (April 24 2007); and *Decision Nos. 1357/03I* (September 26, 2003), *1357/03* (November 19, 2004), and *1357/03R* (April 20, 2007)**

This application for judicial review, involving six decisions for the same worker, has recently been received. It is not clear what the nature of the application for judicial review is for.

At the end of the quarter the Tribunal was in the process of preparing its Record of Proceedings.

Other Proceedings

Human Rights Complaint

A worker appealed for entitlement for benefits for traumatic mental stress, which he alleged was caused by harassment by his supervisor at the workplace. In *Decision 1180/06* a three-person Panel of Tribunal adjudicators denied the appeal, finding that the worker did not sustain a traumatic mental injury in the course of employment so as to entitle him to benefits under the *WSIA*.

The worker filed a Complaint with the Ontario Human Rights Commission, alleging discrimination on the basis of disability and reprisal against the Tribunal and all three panel members who had decided his appeal. The reason for the Complaint against the Tribunal and the panel members appears to be that the worker wants to change the decision in his appeal.

The Respondent Tribunal and panel members have filed an Answer to the Complaint. The Respondents' position is that this Complaint should be dismissed pursuant to section 34 of the Human Rights Code on the grounds that the Complaint should be dealt with more appropriately under other legislation, the Complaint is not within the jurisdiction of the Human Rights Commission, and the Complaint is frivolous, vexatious and made in bad faith.

It is the Respondents' position that there is no evidence whatsoever in support of the Complaint, that the panel members made a decision pursuant to their statutory mandate and in accordance with the Tribunal's exclusive jurisdiction, and that there is absolute immunity from a proceeding such as this by virtue of the *WSIA* and the requirements of public policy as set out in a number of decisions of the courts. While the worker may apply for a reconsideration of the Tribunal's decision, or bring an application for judicial review, the Human Rights Commission has no jurisdiction to change an adjudicative decision of the Tribunal.

At the end of the quarter this matter was still pending.

Highlights of Recent Decisions

Jurisdiction: Decision No. 708/07 (E. Smith) discusses the issue of whether the Tribunal has the implicit jurisdiction to determine whether an employer has entitlement to a retroactive NEER adjustment when the issue before the Tribunal is entitlement to SIEF relief. The Vice-Chair was of the view that the Tribunal has jurisdiction to consider issues that flow from its findings on an initial presenting issue, which would have needed to be addressed by the Board if its primary rulings had been different. The Vice-Chair found that the Tribunal has implicit jurisdiction to determine the NEER adjustment in SIEF appeals, provided there is sufficient relevant evidence on the subject.

Assessable Payroll: Decision No. 1971/06 (M. Crystal) confirmed the Board's finding that gratuities paid to the employer's restaurant and hotel workers, and recorded on the workers' T4 slips were earnings for the purposes of calculating the employer's premiums. Gratuities that are paid to workers directly by the customer are not included in assessable earnings by the Board. Gratuities that are collected by the employer and distributed to the workers are included in assessable earnings by the Board. The fact that a customer gives a gratuity to a worker in relation to their work, does not mean that the work in question was not performed for the employer. The reason the Board does not include gratuities paid directly to the workers by the customers in assessable earnings is likely due to the practical problem of ascertaining the quantum of such earnings. That difficulty does not exist where the gratuities have gone through the employer to be passed on to the workers.

Intervenors: Decision No. 993/02IR4 (E. Smith, P. Barbeau, P. Hodgkiss) contains an interesting discussion of the role of intervenors. In particular it outlines when greater participation by intervenors may be appropriate even when the parties are well represented (e.g. if there is a Charter or constitutional issue, if the parties consent to the participation, if the case is designated a "leading case" or if the interest of the intervenors is different than the parties). It also discusses why the decision to deny the intervenors the right to access to the Case Record should not be reconsidered. In general, intervenors have no interest in the specific facts of the case and therefore there is no need to release confidential medical information to them. In addition, privacy concerns could not be met adequately.

FEL Earnings Basis: Decision No. 701/04R (M. Keil, B. Young, F. Jackson) discusses the divergence in Tribunal caselaw regarding whether higher post-recurrence earnings can be used to calculate the FEL earnings basis. The Panel found that consistency takes precedence over preference for certain lines of decisions. The Panel upheld the original Vice-Chair's reasoning in *Decision No. 701/04* that earnings before the injury under s. 43 of the pre-1997 Act and earnings at the "time of accident" under s. 40(1) means the earnings prior to the original accident and not the earnings prior to the recurrence. The Panel found that the stream of Tribunal caselaw that substitutes "recurrence" for "injury" or "accident" does not rely on reasoning that is as sound as the reasoning set out in *Decision No. 701/04*.

Weight of Court Conviction as Evidence: Decision No. 234/07 (L. Gehrke) agrees with *Decision No. 1544/06* that the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2003), 232 D.L.R. (4th) 385, has found that administrative tribunals are required to give full effect to criminal convictions, and that this should apply also to convictions for offences under the WSIA. The reasonable person would not be able to understand how someone can be found guilty in the criminal courts, but essentially be found "not guilty" of the same allegations in an administrative proceeding.

Occupational Disease: Decision No. 2037/03 (M. Kenny, G. Stewart, P. Hodgkiss) found that a worker's cancer did not arise from occupational exposure as a firefighter. It was submitted that the primary cancer was brain cancer, that the brain cancer was an occupational disease and that the heart attack was precipitated by the brain cancer. The Panel found that the primary cancer was lung cancer and that the brain cancer was metastatic. The cancer was not related to employment since the worker had a 66 pack year history of smoking, there was no medical evidence that the worker's lung cancer arose from his employment and the Ontario Industrial Disease Standards Panel's Report indicated that there was a lack of evidence of excess lung cancer among firefighters.

Class of Employer: Decision No. 911/07 (J. Josefo, J. Robb, M. Ferrari) examined whether a supermarket could have a separate rate group for its pharmacy if it had properly segregated its payroll. The Panel referred to Board Operational Policy Manual, Document No. 08-03-04, regarding segregated payroll. The "process breakdown" rule in the policy provides that, in cases where the employer carries on operations in multiple classifications, the Board may place limits on this kind of process breakdown. This policy considers an employer as an integrated unit to avoid multiplicity of classification units in one location in one operation. Breaking down all aspects of a business into minute parts in order to arrive at the lowest possible classification does not appear to make good workers' compensation sense. The Panel was of the view that it makes good workers' compensation sense to classify an employer based on the big picture approach taking into account the reality of the business operation rather than narrowing it down and ever reducing it to its most basic component parts. The Panel found that the Board has broad authority to establish policy and add and delete classes of employers under sections 159(2)(a) and 183(2) of the WSIA.

Occupational Disease: Decision No. 499/07 (E. Smith, J. Robb, R. Briggs) found that the worker's smoking history created an overwhelming probability that the worker's lung cancer was caused by smoking when weighed against the small and uncertain risk factors from the worker's employment. The Panel examined the worker's smoking history, including how many pack years he had acquired and ascertained the standard mortality rate (SMR) for smokers with that many pack years. The Panel also ascertained the SMR of nickel miners. The Panel found that smokers with that many pack years have 30 times the risk of the general population of developing lung cancer.

S. Adams
October 2007